Accordingly, the motions for leave to amend the libels are denied. The exceptive allegations, and the exceptions in the *American-Foreign Steamship Corporation* and *Luckenbach Steamship Company* cases, are sustained. The cross-motion by American Foreign Steamship Corporation to dismiss its own amended libel for lack of jurisdiction of the district court over the subject matter is denied on the authority of the *American Eastern* and *Sword Line* cases, *supra*.

Settle orders on notice.

Dated: May 11, 1956.

EDMUND L. PALMIERI
U. S. D. J.

OPINION OF THREE-JUDGE PANEL OF COURT OF APPEALS (American-Foreign Steamship Corporation, et al. v. United States, 265 F. 2d 136 (2 Cir. 1957)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 126, 135, 214-225—October Term, 1956.

(Argued January 15, 1957 Decided September 25, 1957.)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24200

STOCKARD STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24291

A. H. BULL STEAMSHIP CO., BULL-INSULAR LINE, INC., BALTIMORE INSULAR LINE, INC.,

Libelants-Appellants,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24292

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24283

DICHMANN, WRIGHT & PUGH, INC.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24284

POLARUS STEAMSHIP CO., INC.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24285

A. L. BURBANK & COMPANY, LTD.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24286

T. J. STEVENSON & CO., INC.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Nos. 24287 and 24289

NORTH ATLANTIC AND GULF STEAMSHIP CO.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24288

LUCKENBACH STEAMSHIP COMPANY, INC.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24400

BLIDBERG ROTHCHILD CO., INC.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Nos. 24401 and 24402

FALL RIVER NAVIGATION CO.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

MEDINA and HINCKS, *Circuit Judges*, and
LEIBELL, *District Judge*.

Consolidated appeals from orders of the United States District Court for the Southern District of New York, Palmieri and Herlands, *JJ.*, finally dismissing for lack of jurisdiction libels to recover allegedly illegal overcharges made by the Maritime Commission on its charter dealings with the libelants. Affirmed as to all appeals except the Diehmann, Wright & Pugh, Inc. appeal, which is dismissed.

J. FRANKLIN FORT, KOMINERS & FORT, Washington, D. C. (John Cunningham, Israel Convisser and Edwin K. Reid, of counsel), *for all libelants-appellants except American-Foreign Steamship Corp.*

Of Counsel:

Burlingham, Hupper & Kennedy, New York, N. Y., for North Atlantic & Gulf Steamship Co. and Luckenbach Steamship Co.

Cravath, Swaine & Moore, New York, N. Y., for New York and Cuba Mail Steamship Company.

Hill, Betts & Nash, New York, N. Y., for Dichmann, Wright & Pugh, Inc.

Kirlin, Campbell & Keating, New York, N. Y., for A. H. Bull Steamship Co., etc.

Lester Levin, New York, N. Y., for Polarus Steamship Co., Inc., A. L. Burbank & Co., Ltd., and T. J. Stevenson & Co., Inc.

Zock, Petrie, Sheneman & Reid, New York, N. Y., for Stockard Steamship Corp., Blidberg Rothchild Co., Inc., and Fall River Navigation Company (Roberts & McInnis, Washington, D. C., Francis J. O'Brien, Charles B. McInnis, and Roger H. Muzzall, of counsel, in Fall River Navigation Company).

ARTHUR M. BECKER, FOLEY, JAMES & CONRAN, New York, N. Y. (Becker & Maguire, Washington, D. C., of counsel), *for libelant-appellant American-Foreign Steamship Corporation.*

BENJAMIN H. BERMAN, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice (George Cochran Doub, Asst. Attorney General, Paul W. Williams, United States Attorney, S. D. N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., on the brief), *for United States of America.*

HINCKS, *Circuit Judge*:

Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50 U. S. C. A. App. §1735 *et seq.*, and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions of the Act, exacted from them too great a percentage of the profits and these actions were brought under the Suits in Admiralty Act, 46 U. S. C. A. §741 *et seq.*, to recover the illegally collected amounts. The foregoing cause of action is asserted in each of the libels. In several of the cases some payments were made by the shippers after redelivery of the ships and within two years of the filing of the libel. And some of the libelants sought to obtain refund of certain alleged overcharges caused by the Commission's refusal to allow certain expense deductions and its refusal to permit cumulative accounting under certain circumstances.[1]

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims stated therein were barred by the two-year limitation of the Suits in Admiralty Act, 46 U. S. C. A. §745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commission, and that this "redelivery" date in all cases was more than two years prior to the commencement of suit. We append to this opinion a chart showing the dates pleaded in the libels and, in some cases,

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1 A few of the libels alleged disputes as to the valuation of specific items entering into the cost basis upon which the profits were calculated. These included differences concerning the amount of "capital necessarily employed," the "post redelivery overhead expenses," the "cost of repairing latent defects," "management fees" and "agency fees."

in the Government's exceptive allegations. Since the dates in the exceptive allegations were not challenged, we accept them as true.

Judge Palmieri, in an opinion reported at 141 F. Supp. 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River Navigation Co., and denied leave to amend because, however pleaded, the actions were time-barred. Judge Herlands, in a memorandum opinion set out in the margin,[2] dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was correct to dismiss the libels and deny amendment because jurisdiction was lacking.

2

"November 5, 1956

MEMORANDUM

"Libelant here seeks to recover from respondent alleged overpayments made pursuant to its charter of certain Government-owned vessels. Libelant further seeks leave to amend its libel in order to allege, in fuller detail, the transactions giving rise to the alleged causes of action.

"Respondent excepts to the libel as time-barred under Suits in Admiralty Act, 46 U. S. C. A. section 741, et seq., and opposes the proposed amended libel on the theory that, as amended, the libel still fails to state a cause of action accruing within the required two-year limit prior to the date of filing of the libel.

"Respondent's exception is sustained; libel dismissed. Libelant's application for leave to amend is denied.

"The points now at issue before the Court have been too well-settled by recent authoritative decisions as to require consideration de novo. *Sword Line* v. *United States*, 228 F. 2d 344 (C. A. 2 1955), aff'd on petition for rehearing 230 F. 2d 75 (1956), aff'd 351 U. S. 976 (1956), cert. having been granted only on the question of admiralty jurisdiction; *American Eastern Corp.* v. *United States*, 133 F. Supp. 11 (S. D. N. Y. 1955); aff'd 231 F. 2d 664 (C. A. 2 1956), cert. denied 351 U. S. 983 (1956); *A. H. Bull Steamship Co.* v. *United States*, 141 F. Supp. 58 (S. D. N. Y. 1956). The Court has read the briefs in the three cited cases and is satisfied that the questions of law presented herein were adequately argued before and decided by the courts in such cases.

"Settle order on notice.

WILLIAM B. HERLANDS
United States District Judge."

Before dealing with this question, we note that we are without appellate jurisdiction over the Dichmann, Wright & Pugh appeal. Dichmann, in its reply brief, conceded that, since the second count of its libel was still pending in the District Court, its appeal from the dismissal of the first and third counts was interlocutory. It cited 28 U. S. C. A. §1292(3) as express statutory authority for us to entertain this appeal. But our authority to entertain interlocutory admiralty appeals is limited by the requirement of 28 U. S. C. A. §2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956,—more than 15 days later. The appeal therefore is too late, and must be dismissed. *The Fanny D* (*Eggers* v. *Southern Steamship Co.*), 5 Cir., 112 F. 2d 347, cert. den. 311 U. S. 680; *Blaske* v. *Dick*, 7 Cir., 126 F. 2d 96, 98.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute to charter vessels owned by the Government. The statute, 50 U. S. C. A. App. §1735 *et seq.*, provided for rental rates in §1738, which incorporated by reference §709(a) of the Merchant Marine Act, 46 U. S. C. A. §1199(a). This latter section provided that every charter executed by the Maritime Commission should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire one-half of the profits in excess of a 10% return of employed capital. The Commission, claiming that §709(a) merely set a minimum additional charter hire, proceeded to charter its ships pursuant to charters which provided a sliding scale for the additional charter hire depending on the amount of profit per day in excess of the 10% return. The libelants, as charterers, agreed to progressive rates which allowed the Commission

to recapture 90% of the profits in excess of $300 per day, per vessel, above the 10% return, and made payments accordingly.

However, the libelants objected to the sliding scale rate as illegal before making payment thereunder and obtained from the Maritime Commission the assurance that payments of charter hire were to be deemed preliminary and subject to adjustment until final audit. In recognition of this the Commission inserted Clause 13 in the charters.[3] In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. To support this, they point to Commission regulations, 46 CFR §§299.31 (k) (1), 299.37-2 (a) (1), (2) and (b) (3), to instructions such as the one set out in the margin,[4] and to the Commis-

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3 "Clause 13. Additional Charter Hire. • • •

• • • • • •

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiseout) charter (prior to the times of payment provided for above or in such Warshipdemiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

4 "Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either

sion's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U. S. C. A. App. §1745(d).

The libelants argue that the cause of action for return of charter hire illegally exacted accrued as of the date of final audit, or—at the earliest—when the last payment or credit entry in their account with the Commission was made. In all cases this would avoid the time bar. The Government contends that the statute commenced running as of the date when each libelant redelivered the chartered vessels to the Commission. If this be so, these libels would be time-barred.

We agree with the judges below that the basic issues in this appeal were decided adversely to the appellants in our decision in *Sword Line* v. *United States,* 2 Cir., 228 F. 2d 344, aff'd on petition for rehearing 230 F. 2d 75, aff'd as to jurisdiction 351 U. S. 976, and in *American Eastern Corp.* v. *United States,* 133 F. Supp. 11, aff'd 2 Cir., 231 F. 2d 664, cert. den. 351 U. S. 983.

The *Sword Line* case held that a cause of action, such as that presented in these appeals, accrues as of the redelivery date. See 228 F. 2d 344, 347; 230 F. 2d 75, 76. In so holding, the majority in that case carefully considered and explicitly rejected the argument that the effect of Charter Clause 13 was to delay the commencement of the running of the statute until final audit. This was also the holding in *American Eastern, supra,* 133 F. Supp. at page 15.

To avoid the impact of these decisions, the appellants have restated their theories but even as restated most of them were presented and rejected in *Sword Line* and

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party under the terms of the agreements involved or otherwise." (May 14, 1951 letter from Maritime.)

American Eastern. The "mutual account" or "open account" theory as advanced by Judge L. Hand was rejected by his colleagues in *Sword Line*, 228 F. 2d at 347, and by the court in *American Eastern*, 133 F. Supp. at page 15. Nor were the preliminary charter hire payments a "trust fund" because they were kept in a special account. This argument was forcefully brought to the court's attention in the *American Eastern* appeal by a letter from appellants' counsel which thoroughly discussed the point and cited the court to *Rosenman* v. *United States*, 323 U. S. 658. In its petition for rehearing in *Sword Line*, the appellant made essentially the same argument but in somewhat more general terms.

There remains the contention, forcefully urged by those appellants to whom it is available, that, even if suits for refund of payments made prior to redelivery of the ships are time-barred, the court had jurisdiction over those libels which demanded refund of post-redelivery payments to the Commission which were made within two years of the filing of the libel. (For libels so situated, see the Appendix hereto.) The Government replies that the libelants cannot now demand refund since such payments were voluntary, citing *Railroad Co.* v. *Commissioners*, 98 U. S. 541, and *Cunard S.S. Co.* v. *Elting*, 2 Cir., 97 F. 2d 373, and that, in any event, since the libelants accepted the ships on the Commission's terms, they are now estopped from disputing them, citing *Commissioner of Internal Rev.* v. *National Lead Co.*, 2 Cir., 230 F. 2d 161, aff'd on other grounds 352 U. S. 313.

This point was unmistakably presented and was disposed of without discussion by another panel of this court in *Sword Line* in an opinion which did not explain why the court lacked jurisdiction of the claim for recovery of the post-redelivery payments. However, the rationale of the opinion in that case which was equally applicable

to payments made before and after redelivery, and the rationale of *American Eastern*, required the orders of dismissal now before us on review. Indeed, in its briefs and its petition for rehearing in *Sword Line*, the libelant pointed out that after redelivery and within two years prior to the libel it had paid to the Commission $660,000, which it contended was additional charter hire. Yet the court held that there was no jurisdiction to entertain the claim.

Apparently the only point now pressed which was not determined in *Sword Line* or *American Eastern* was raised in the Blidberg libel. This concerned a claim for expenses incurred in repairing latent defects which existed when the ships were received by Blidberg. But this claim was obviously in existence, at the very latest, when the ships were redelivered. Since the libels were not filed within two years of the redelivery these claims are barred. 46 U. S. C. A. §745.

If the subject-matter of these appeals were *res nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in *Sword Line* and by *American Eastern*. However, we will not overrule these recent decisions of other panels of the court. On the authority of *Sword Line* and *American Eastern* we hold that these libels also were barred.

Accordingly, the decrees appealed from are affirmed except the Dichmann, Wright & Pugh, Inc. appeal which is dismissed.

APPENDIX

Docket No.	Name of Libelant	Libel Filed	Charter Contracts Signed	Last Ship Redelivered	Last Final Audit	Date of Last Payment to Maritime	Date of Last Item in Account
24190	American-Foreign S.S. Corp.	11/24/54	6/ 6/46 9/ 2/46	12/28/49	10/11/54*	9/21/53	9/21/53
24200	Stockard S.S. Corp.	10/ 5/54	9/ 2/46 8/21/50 1/ 5/51	2/11/52*	5/20/55 (supplement)	6/23/53	12/21/53
24283	**Dichmann, Wright & Pugh, Inc.	5/13/54	9/ 2/46 10/ 5/46	12/10/49*	12/12/52	2/26/53	11/20/53
24284	Polarus S.S. Co., Inc.	11/10/54	10/18/46	12/ 7/49*	11/13/52	4/ 6/53***	7/29/54
24285	A. L. Burbank & Co., Ltd.	5/27/54	9/26/46 9/ 3/46	4/17/48*	11/ 9/54	3/16/53	4/25/55
24286	T. J. Stevenson & Co., Inc.	3/16/55	11/18/46	12/ 2/49*	9/ 1/53	11/27/53	6/10/54
24287	North Atl. & Gulf S.S. Co.	12/16/54	10/31/46	6/10/48*	None yet	5/18/53	5/17/54
24288	Luckenbach S.S. Co., Inc.	12/20/55	7/12/46 9/24/46 1/ 5/51	4/23/51	12/22/53 No audit yet on 1951 contract	No payments after 12/20/53	12/14/53
24289	North Atl. & Gulf S.S. Corp.	10/21/54	7/17/51 4/ 2/52	2/13/52*	11/ 8/54 No audit yet for 12/54 contracts	9/27/53	5/17/54
24291	A. H. Bull S.S. Corp.	4/22/54	4/21/47 9/ 2/46 9/13/46	2/26/48*	5/12/52	8/18/53	9/29/53
24292	New York & Cuba Mail S.S. Co.	1/27/55	11/12/46 11/25/46 10/26/50 11/28/50	5/28/52*	10/ 4/54	9/24/53	12/ 7/54
24400	Blidberg Rothchild Co., Inc.	4/13/56	6/25/46 9/ 4/46	11/28/49	4/16/54	8/19/55***	11/ 7/56
24401	Fall River Navigation Co.	2/14/56	6/ 1/46 9/ 2/46	10/28/49	3/10/54	No payments after 2/14/54	6/ 9/52
24402	Fall River Navigation Co.	2/14/56	6/ 1/46 9/ 2/46	10/28/49	3/10/54	No payments after 2/14/54	5/10/54

* Information obtained from exceptive allegations.

** This covers only first cause of action.

*** Setoff; not actual payment.

OPINIONS OF FIRST EN BANC COURT DENYING GOVERNMENT'S PETITION FOR REHEARING (American-Foreign Steamship Corporation, et al. v. United States, 265 F. 2d 136, 153 (2 Cir. 1959))

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Submitted August 26, 1958 Decided March 26, 1959.)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

AMERICAN-FOREIGN STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee,

And thirteen companion cases.

Before:

CLARK, *Chief Judge,*

MEDINA, HINCKS, WATERMAN and MOORE, *Circuit Judges.*

Petition of Appellee for Further Rehearing en Banc

GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Arthur H. Christy, United States Attorney, Southern District of New York, New York, N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Benjamin H. Berman, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice, and William E. Gwatkin, III, Atty., Admiralty & Shipping Section, Dept. of Justice, *for petitioner.*

HINCKS, *Circuit Judge*:

The United States, as appellee, attacks the decision carried in our opinion of July 28, 1958, on the ground, *inter alia*, that Judge Medina, who concurred therein, by virtue of his retirement on March 1, 1958 was disqualified under 28 U. S. C. A. §46(c) from participating. We disagree.

It was on December 19, 1957 that we granted rehearing of our earlier decision before the court *in banc*. The court *in banc* comprised Chief Judge Clark, Judges Medina, Hincks, Waterman and Moore, all then active circuit judges. Judge Lumbard declined to sit with the court on the ground that he was disqualified by reason of earlier contacts with the cases below when serving as United States Attorney. The court *in banc* when thus constituted conformed in all respects to 28 U. S. C. A. §46(c) which provides: "A court in banc shall consist of all active judges of the circuit." Since Judge Medina was a member of the court *in banc* which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached. Nothing in the Code requires that the court of appeals when once constituted according to law, whether *in banc* or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member of the court thereafter retiring or to include an active member of the court thereafter appointed. As the Reviser's note indicates, §46 was included in the Code of 1948 to preserve the interpretation established by *Textile Mills Securities Corporation* v. *Commissioner of Internal Revenue*, 314 U. S. 326, that notwithstanding the three-judge provision of §212 of Title 28 U. S. C., 1940 Ed., a court of appeals might lawfully consist of a greater number of judges sitting *in banc*. Nothing in *Textile Mills* nor the Code provisions which preserve its interpretation suggests that retirement

under 28 U. S. C. A. §371 operates to terminate the power of the retiring judge as a member of the court *in banc* to participate in the decision of a case formerly assigned to the court but as yet undecided. We have found no reported case which so holds. We think the case of *Commercial National Bank in Shreveport* v. *Connolly*, 5 Cir., 177 F. 2d 514, supports our conclusion that the competence of a judge who is once duly constituted a member of a court *in banc*, may survive his retirement. There Judge Sibley who as an active member of the Fifth Circuit Court of Appeals had participated in the decision of a case heard *in banc*, thereafter retired (on October 1, 1949) and *subsequently* cast the decisive vote for an order (filed November 16, 1949) denying a petition for rehearing which had been made to the court *in banc*.

Moreover, §43(b) of the Code of 1948 provides: "Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court." This provision is not stated to be exclusive of the "judges designated or assigned" to hear and determine a case as members of a court *in banc*. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in §46(b) and to judges designated and assigned under §§294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under §46(c) was designated and assigned as a member of the court *in banc* was competent even after his retirement to sit under §§43(b), 294(b) and 296.

The other claims of error raised in the petition we think unfounded. They involve matters already carefully considered by us. And the requested clarifications we think unnecessary and inappropriate. We have reversed and remanded for a determination of jurisdiction and, if juris-

diction be sustained, of the merits. We have made it plain that these determinations should be made without constraint by *Sword Line* v. *United States*, 2 Cir., 228 F. 2d 344, and *American Eastern Corp.* v. *United States*, 2 Cir., 231 F. 2d 664, and of course in conformity with our opinion of July 28, 1958. The questions now put to us are questions for answer by the parties and the trial court.

Petition denied.

Separate statement of CLARK, *Chief Judge*, and WATERMAN, *Circuit Judge*:

Judge Hincks' opinion herewith demonstrates both the difficulty and the impracticability of interpreting the governing statute, 28 U. S. C. §46(c), otherwise than by giving the word "determined" its normal meaning of "decided," and the word "active" its natural force of "non-retired." This view is underlined by the contrast drawn between judges "in active service" and "retired" judges, even though designated to sit, in the several statutes such as 28 U. S. C. §§294(b) and (d), 295, 296, and 371(b). It appears to be the general conclusion of other circuits. *In re Sawyer*, 9 Cir., 260 F. 2d 189, 203, n. 17, certiorari granted 358 U. S. 892; *G. H. Miller & Co.* v. *United States*, 7 Cir., 260 F. 2d 286, 305; *United States* v. *Gordon*, 7 Cir., 253 F. 2d 177, 185, 191, 194; see also *United States* v. *Sentinel Fire Ins. Co.*, 5 Cir., 178 F. 2d 217, 239, and *Commercial Nat. Bank in Shreveport* v. *Connolly*, 5 Cir., 177 F. 2d 514, interpreted in the light of Fifth Circuit Rule 29 stating the vote required for a rehearing. And it has been the uniform practice of our own elder colleagues. *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, 375, 376, certiorari denied *California Tanker Co.* v. *Reardon*, S. Ct., March 2, 1959; *United States* v. *Silverman*, 2 Cir., 248 F. 2d 671, 696, certiorari denied 355 U. S. 942; *Harmar Drive-In Theatre*

v. *Warner Bros. Pictures,* 2 Cir., 241 F. 2d 937, certiorari denied 355 U. S. 824. Moreover, it is necessary if the obviously indicated policy that the active circuit judges shall determine the major doctrinal trends of the future for their court is not to be flouted by the freezing in of a particular grouping of judges for months (as here) or even for years. And so notwithstanding some personal regret and even doubt as to the ultimate wisdom of the policy, it must be held that the decision of July 28, 1958, purporting to reverse the decrees below is ineffective and void for lack of a valid majority vote and those decrees under consideration here must stand affirmed by an equally divided court. *People* v. *Bork,* 96 N. Y. 188, 199; *Watson* v. *Payne,* 94 Vt. 299, 111 A. 462.

SUPREME COURT, U. S.

FILED
SEP 22 1961
JAMES R. BROWNING, Clerk

Nos. 290 and 332

In the Supreme Court of the United States

OCTOBER TERM, 1961

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

STOCKARD STEAMSHIP CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, Jr.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
LEAVENWORTH COLBY,
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CITATIONS

Cases:

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American Eastern Corp. v. *United States*, 133 F. Supp. 11, affirmed *per curiam*, 231 F. 2d 664, certiorari denied, 351 U.S. 983 — 6, 7, 8, 11

Sword Line, Inc. v. *United States*, 228 F. 2d 344, affirmed on rehearing, 230 F. 2d 75, affirmed, 351 U.S. 976 — 6, 7, 8, 11

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Statutes:

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 290

AMERICAN-FOREIGN STEAMSHIP CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 332

STOCKARD STEAMSHIP CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Palmieri, D.J.) covering 11 of the 14 libels involved is reported as *A. H. Bull Steamship Co.* v. *United States,* 141 F. Supp. 58. The opinion of the United States District Court for the Southern District of New York (Herlands, D.J.) covering the other three libels is not reported, but is set forth in footnote 2 to the